Supreme Court, U.S.
FILED
MAY 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1476

In the Supreme Court of the United States

OCTOBER TERM, 1989

SEATTLE-FIRST NATIONAL BANK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's determination that when a certified independent union became a local affiliate of an international union, there was sufficient continuity between the independent union and the local affiliate to require petitioner to bargain with the local affiliate.

2. Whether the National Labor Relations Board properly denied petitioner's request to schedule a supplemental hearing to consider post-hearing developments.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

American Bridge Div., U.S. Steel Corp. v. *NLRB*, 457 F.2d 660 (3d Cir. 1972) 7, 10, 11

Amoco Production Co., 239 N.L.R.B. 1195 (1979) 8

Amoco Production Co. v. *NLRB*, 613 F.2d 107 (5th Cir. 1980) 2, 3, 8

Franks Brothers Co. v. *NLRB*, 321 U.S. 702 (1944) (1964) 6, 13

Garlock Equipment Co., 288 N.L.R.B. No. 31 (Mar. 25, 1988) 10

L'Eggs Production, Inc. v. *NLRB*, 619 F.2d 1337 (9th Cir. 1980) 6

May Department Stores Co. v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990) 9, 11

NLRB v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976) 7, 10, 11

NLRB v. *Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987) 13

NLRB v. *Financial Institution Employees, Local No. 1182*, 475 U.S. 192 (1986) 3, 5, 7, 8, 9, 10, 11, 12, 13

NLRB v. *Financial Institution Employees, Local No. 1182*, 752 F.2d 356 (9th Cir. 1984) 3

NLRB v. *Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir. 1986) 9, 11

Cases—Continued: Page

News/Sun Sentinel Co. v. *NLRB*, 890 F.2d 430 (D.C. Cir. 1989), petition for cert. pending, No. 89-1641 9
Seattle-First National Bank, 265 N.L.R.B. 426 (1982) 3
Sun Oil Co. v. *NLRB*, 576 F.2d 553 (3d Cir. 1978) 6-7, 10, 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 10
Western Commercial Transport, Inc., 288 N.L.R.B. No. 27 (Mar. 25, 1988) 9

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2
§ 8(a)(5), 29 U.S.C. 158(a)(5) 2
§ 9(c)(1), 29 U.S.C. 159(c)(1)) 3
29 C.F.R. 102.48(d)(1) 5, 13

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1476

SEATTLE-FIRST NATIONAL BANK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 892 F.2d 792. The decision and order of the National Labor Relations Board (Pet. App. 24a-33a) is reported at 290 N.L.R.B. No. 72. The order of the National Labor Relations Board denying the motion for a supplemental hearing (Pet. App. 22a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1989. The petition for a writ of certiorari was filed on March 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, the National Labor Relations Board certified the FirstBank Independent Employees Association (the

Independent) as the exclusive bargaining representative of petitioner's employees. Petitioner and the Independent thereafter entered into a collective bargaining agreement, which lasted until October 1977. At that time, the Independent's executive council sought to affiliate with the Retail Clerks International Union (the International), and therefore scheduled an affiliation election for February 1978. The Independent informed petitioner's bargaining unit employees that only those who joined the union by January 19, 1978, would be eligible to vote. Pet. App. 3a-4a, 66a.

A majority of the Independent's members voted for affiliation. On April 1, 1978, the International therefore chartered the Independent as the Financial Institution Employees of America, Local 1182 (FIEA). In June, FIEA petitioned the Board to amend its certification to reflect its new name. Petitioner opposed the certification, contending that "the election violated due process by excluding nonmembers and [that] the affiliation broke the continuity of representation required." Pet. App. 4a. The Board held a two-day hearing in late July 1978. In April 1979, the Board granted FIEA's request and amended its certification to reflect the union's new name and affiliation. *Ibid.*; see *id.* at 64a-69a.

2. Petitioner refused to bargain with FIEA. In September 1979, the Board found that such refusal violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and ordered petitioner to bargain with the union. Pet. App. 54a-62a. Petitioner sought review in the court of appeals, but on the Board's request, the court remanded the case for reconsideration in light of *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).[1] On remand, the Board held that because non-

[1] In *Amoco*, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation.

members were not allowed to vote in the affiliation election, that election was invalid. The Board consequently dismissed the unfair labor practice charges against petitioner and vacated FIEA's amended certification. Pet. App. 25a; see *Seattle-First National Bank*, 265 N.L.R.B. 426 (1982).

On FIEA's petition for review, the court of appeals held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was inconsistent with the National Labor Relations Act. *NLRB* v. *Financial Institution Employees, Local No. 1182*, 752 F.2d 356 (9th Cir. 1984). On the Board's petition for a writ of certiorari, this Court affirmed the court of appeals' decision, holding that the Board "exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." *NLRB* v. *Financial Institution Employees, Local No. 1182* (*FIEA*), 475 U.S. 192, 209 (1986).[2] Since the Board had not reconsidered its continuity determination, and the court of appeals had not addressed that issue, the Court remanded the case for further proceedings. *Id.* at 200 n.7, 209 n.13.

3. In July 1988, the Board issued its decision on remand, determining that "[w]hile some differences exist between the FIEA and the [Independent], these are not 'sufficiently dramatic' to alter the identity of the bargaining representative and raise a question concerning representation." Pet. App. 27a. Accordingly, the Board reinstated its earlier order

---

The Board ordered the employer to bargain, but the Fifth Circuit remanded the case for the Board to determine whether affiliation had substantially changed the union. 613 F.2d at 112.

[2] Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), requires the Board to direct an election to determine a union's representative status "if [the Board] has reasonable cause to believe that a question of representation affecting commerce exists * * *."

amending the Independent's certification and ordered petitioner to recognize and bargain with FIEA. *Id.* at 32a-33a.

At the outset, the Board stated that "[i]n each case continuity is determined by a factual comparison between the pre- and post-affiliation representative." Pet. App. 32a. The Board found that, "after the affiliation, [FIEA's] officers, and their responsibilities, remained the same as those who served for [the Independent]." *Id.* at 28a.[3] The Board also found that there had not been any significant changes in eligibility for membership or local office. *Id.* at 29a. The Board noted that the International's constitution permitted FIEA to expand its organizing efforts beyond petitioner's employees. That authority, the Board concluded, was not inconsistent with continuity, since the Independent's executive council had the same power. *Ibid.*

The Board further found that "autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes." Pet. App. 32a. For example, the Board recognized that, under the International's constitution, the "terms of proposed collective-bargaining contracts must be submitted to the International president for approval *upon request* * * * prior to membership action." *Id.* at 31a. But the Board found that, in practice, the local unions negotiated their own contracts, and that the International provided assistance only on request.

---

[3] The Board noted that "[i]n the year since affiliation, there has been a natural turnover of individuals occupying these offices." Pet. App. 28a. The Board discounted that fact, however, since "[t]here is no evidence * * * that replacement of officers was a condition of the affiliation or a result of any action taken by the International." *Id.* at 28a-29a. In fact, two of the three pre-affiliation officers stopped working for petitioner before the July 1978 hearing. *Id.* at 18a. FIEA replaced those officers according to the pre-affiliation rules. See July 26, 1978, Tr. 58, 242.

Ibid. Similarly, although the International's constitution empowers the International to place a local in trusteeship, the Board found that the International had exercised that authority only in the most extraordinary circumstances. *Id.* at 31a n.11.[4] After the Board's initial decision, petitioner filed a motion for reconsideration, asking the Board to schedule a supplemental hearing to consider alleged additional post-affiliation developments in the certified union. The Board denied that motion. Pet. App. 22a-23a & n.3. The Board declined to depart from its established practice against reopening a record to receive evidence of events that occurred after the hearing, see 29 C.F.R. 102.48(d)(1), particularly where, as here, petitioner's evidentiary proffer "does not contain information that even if credited would require the Board to reach a different result." Pet. App. 23a n.3.

3. The court of appeals enforced the Board's bargaining order and denied the petition for review filed by Seattle-First National Bank. Pet. App. 1a-21a. In the court of appeals, petitioner contended that the Board's "setting a hearing four months after an affiliation [did] not allow [petitioner] enough time to prove that changes have occurred, since a 'devious' International could present a facade for

---

[4] Petitioner also contended that, under *NLRB* v. *Financial Institution Employees, Local No. 1182*, 475 U.S. 192, 209 (1986), the Board should include, "as part of a due process component of the continuity inquiry, a general examination of 'the extent of [employee] opposition to the affiliation.' " Pet. App. 27a n.10. The Board rejected that contention, stating that such an inquiry would be "tantamount to the Board's conducting an informal poll * * * among those employees to whom, the Court held, no opportunity to vote in the affiliation election need be extended." *Id.* at 27a-28a n.10. The Board noted that, apart from the continuity inquiry, a question of representation "may still be raised in the traditional manner, by a timely employee-filed decertification petition or by proof [by the employer] of objecti[ve] considerations for good faith doubt." *Id.* at 28a n.10.

that long." *Id.* at 10a. The court rejected that claim, noting that, under petitioner's theory, a "devious union might be able to put up a front for even longer." *Ibid.* The court found that "[t]he hearing on the amendment to certification was the most expeditious and efficient proceeding in the twelve-year saga of this litigation." *Ibid.* The court therefore declined to "fault the Board for expedition." *Ibid.*

Moreover, the court determined that even if petitioner's argument had merit in the abstract, it collapsed on the facts of this case. Here, the July 1978 hearing "offered ample opportunity [for petitioner] to make its case on the issue of continuity," Pet. App. 10a, and petitioner "made no effort to develop a record * * * on the future changes expected in the relationship among the International, the union, and its members," *ibid.* The court concluded that "[a]ny paucity in the record inheres in the facts themselves, or in [petitioner's] failure to elicit them." Accordingly, the court held that the Board had properly refused to grant petitioner an additional hearing. *Ibid.*[5]

Turning to petitioner's challenge to the Board's continuity determination, the court of appeals stated that "[t]he ultimate question is whether the union after affiliation operates in substantially the same way as it did before affiliation." Pet. App. 15a.[6] Reviewing the record, the court

---

[5] Petitioner pressed (Pet. App. 6a-7a) the court of appeals to review the Board's continuity determination in light of events that occurred after the Board's decision, *i.e.*, FIEA's merger with a local of the United Food and Commercial Workers International in 1988. Given established precedent precluding endless expansion of the record in bargaining cases, see, *e.g.*, *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702 (1944); *L'Eggs Products, Inc.* v. *NLRB*, 619 F.2d 1337 (9th Cir. 1980), the court of appeals refused to consider such additional evidence. Pet. App. 7a.

[6] In the court of appeals, petitioner challenged (Pet. App. 12a-13a) the Board's approach in resolving continuity issues as inconsistent with a series of Third Circuit decisions. See, *e.g.*, *Sun Oil Co.* v. *NLRB*,

found substantial evidence in support of the Board's determination that, "although the affiliation brought changes, * * * the new union retained enough of its old character to render those changes insufficiently dramatic to warrant a finding that there could be a question of representation." *Id.* at 20a. "[A]ccord[ing] substantial deference both to the Board's choice of relevant factors and to the weights the Board assigns those factors,"[7] the court concluded that there "[was] no reason to upset the Board's calculus." *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the Board "should have considered evidence regarding employee support for affiliation as a factor in determining continuity." Pet. App. 20a. The court observed that petitioner was "essentially trying to fight the same battle that it lost in the Supreme Court [in *FIEA*]," since that decision held that "affiliation is an internal union affair so long as continuity is maintained." *Ibid.* Moreover, the court pointed out that the "flaw in [petitioner's] reasoning is that it assumes an employee's vote for affiliation is evidence of his or her feeling that the new union will be substantially

---

576 F.2d 553 (1978); *NLRB* v. *Bernard Gloekler North East Co.* v. *NLRB*, 540 F.2d 197 (1976); *American Bridge Div., U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972). In those decisions, the Third Circuit suggested that the Board should weigh such factors as increased size, financial support, and bargaining power. The court of appeals concluded that petitioner erred in relying on case law predating this Court's decision in *FIEA*, since the Court's comments in that decision regarding the Board's approach in resolving continuity issues (475 U.S. at 199-200) "strongly suggest[ ] that certain changes inhere in affiliation and should not be accorded significant weight in deciding the question of continuity." Pet. App. 12a.

[7] For example, the court accepted the Board's view that the International's established practices, rather than the letter of the constitutional provisions, were relevant to the continuity inquiry. Pet. App. 15a-16a.

the same as the old. There is simply no basis for attributing that motive to a vote." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 8-20) that the Board erred in determining that there was sufficient continuity between the certified independent union and the successor local union to require petitioner to bargain with the local union. Under its established practice, the Board amends the certification of a newly affiliated local union to reflect its new name unless the change raises a question of representation.[8] As this Court has recognized, such a change is principally an internal union matter that "does not create a new organization, nor does it result in the dissolution of an existing organization." *FIEA*, 475 U.S. at 206 (quoting *Amoco Production Co.*, 239 N.L.R.B. 1195 (1979)). Rather, "[t]he Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation." *FIEA*, 475 U.S. at 209. And an affiliation raises a question of representation, only where the "organizational and structural change[s] * * * may substantially change a certified union's relationship with the employees it represents." *FIEA*, 475 U.S. at 202.

In making that factual determination, the Board compares the pre- and post-affiliation representative to decide whether the changes were "sufficiently dramatic" to alter

---

[8] As the court of appeals stated, "[a] 'question of representation' is defined as sufficient doubt about the union's continuing status as the legitimate representative of employees in a particular unit that a new election should be conducted to determine employee sentiment." Pet. App. 11a.

"the fundamental character of the representing organization." *Western Commercial Transport, Inc.*, 288 N.L.R.B. No. 27 (Mar. 25, 1988), slip op. 13, 14 (quoting *FIEA*, 475 U.S. at 206). Consequently, the Board considers a range of factors, including the continued leadership responsibilities of the existing union officials, the perpetuation of membership rights and duties, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated, and the preservation of the certified representative's assets, books, and physical facilities. *E.g.*, *Western Commercial Transport, Inc.*, slip op. 11. And the courts of appeals have expressly endorsed the Board's fact-specific approach. See, *e.g.*, *May Department Stores Co.* v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990), slip op. 12-14; *News/Sun Sentinel Co.* v. *NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989), petition for cert. pending, No. 89-1641; *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 966-967 (1st Cir. 1986).

Here, the Board followed that approach and found that the Independent, after affiliation, had not surrendered control over the important decision-making and representational functions. In other words, the record showed that "autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes." Pet. App. 32a.[9] In these circumstances, the Board properly determined that there was sufficient continuity between the certified independent union and the local union created

---

[9] Petitioner chastises the Board for not considering "the documented shifts in power and control that occur when, for example, a former independent gives an international the right to approve strikes." Pet. 13. That criticism is wide of the mark. Here, the Board expressly found that the affiliated local could strike without the International's approval and that the International could not force the affiliated local to participate in a strike. Pet. App. 31a.

after affiliating with the international to require petitioner to bargain with the local union. Accordingly, further review of petitioner's fact-specific challenge to the Board's decision is not warranted. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[10]

2. Petitioner also contends (Pet. 10-14) that the decision below conflicts with a series of Third Circuit decisions. *E.g.*, *Sun Oil Co.* v. *NLRB*, 576 F.2d 553 (1978); *NLRB* v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (1976); *American Bridge Div., U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972). In those decisions, which predated *FIEA*, the Third Circuit suggested that the Board, in making continuity determinations, should weigh such factors as increased size,

---

[10] Petitioner criticizes the Board's multi-factor approach on the grounds that it creates "a *per se* test * * * designed to show continuity in every affiliation case," Pet. 14, and that it also improperly "concentrate[s] on apparent continuity in easily manipulated and superficial administrative details * * *," *id.* at 15. But petitioner's cited examples (Pet. 14) put to rest its curious assertion that the Board has found continuity in every affiliation case. See, *e.g.*, *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (Mar. 25, 1988), slip op. 8.

Moreover, it is petitioner, and not the Board, that advocates an inflexible standard. Petitioner asserts that the Board must focus on the loss of "employer-specific goals [and] full freedom and autonomy" when "small, independent unions" affiliate. Pet. 20. If followed, that position would be tantamount to a rule that affiliation, by itself, would raise a question of representation in all cases. But in *FIEA*, the Court eschewed such an approach. As this Court recognized, "[a] local union may seek to affiliate with a larger organization for a variety of reasons," including the desire to obtain "bargaining expertise or financial support, or [to] compensate for a lack of leadership within the local union." *FIEA*, 475 U.S. at 199 n.5. The Court therefore pointed out that the Act authorizes the Board to conduct a representation election, as a consequence of affiliation, "*only* where affiliation raises a question of representation." *Id.* at 203.

financial support, and bargaining power. See, *e.g.*, *Sun Oil Co.*, 576 F.2d at 557; *Gloekler*, 540 F.2d at 202; *American Bridge*, 457 F.2d at 663-664.

To the extent those decisions suggest that changes inherent in affiliation preclude a finding of continuity, the cases are not consistent with this Court's decision in *FIEA*. In *FIEA*, the Court recognized that the increased size, financial support, and bargaining power that affiliations create are the ordinary, valid reasons for such mergers. 475 U.S. at 198-199 & n.5. Given this state of affairs, the Court made plain that the Act authorizes the Board to conduct a representation election, as a consequence of affiliation, "*only* where affiliation raises a question of representation," *id.* at 203, *i.e.*, where there is actual evidence of loss of continuity without taking into account such ordinary reasons for affiliation. Since the Third Circuit has not had an opportunity to reconsider those decisions in light of *FIEA*, further review of the present case would be premature.[11]

3. Petitioner further contends (Pet. 20-24) that the Board erred in refusing to consider evidence of employee opposition to continued representation by the affiliated union. Petitioner claims that "[i]f the represented employees *believe* that an affiliation has substantially changed their relationship with the certified union, the Board should not

---

[11] Indeed, as petitioner points out (Pet. 13 n.3), other circuits have questioned the continued validity of the Third Circuit case law in light of *FIEA*. See *May Department Stores Co.* v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990), slip op. 14 n.9; *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 967-968 (1st Cir. 1986).

In any event, in *American Bridge*, 457 F.2d at 663-664, and *Gloekler*, 540 F.2d at 199-202, the Third Circuit relied in part on provisions in the international unions' constitutions in determining that the affiliated locals had lost autonomy. Here, by contrast, the record showed that the international union's established practice was to refrain from exercising the full range of its constitutional powers. See, *e.g.*, Pet. App. 31a. For that reason, the decision below is consistent with *American Bridge* and *Gloekler*.

be allowed to disregard that sentiment and conclude that changes are inconsequential." Pet. 22. But that issue is not presented here. As the court of appeals pointed out, Pet. App. 20a, the principal basis of petitioner's claim of employee dissatisfaction is the affiliation vote, in which roughly 40% of the union members voted against affiliation. Yet there is no reason to assume—and the record contains no basis for inferring—that employees who vote against a particular affiliation do so because they believe the union will be dramatically changed.

Petitioner also appears to argue that the Board, as part of its continuity inquiry, must take into account employee sentiment toward affiliation. This Court's decision in *FIEA* forecloses that claim. There, the Court held that the Board could not require, as a prerequisite to a union's obtaining an amended certification, that all unit employees be afforded the right to vote on an affiliation. 475 U.S. at 209. The Board's consideration of employee sentiment in its continuity inquiry would thus amount to an end run around the Court's express holding in *FIEA*.[12]

4. Finally, petitioner renews its contention (Pet. 24-27) that the Board erred in denying petitioner's request to schedule a supplemental hearing to consider post-hearing changes in the certified union. The Board's rule precluding consideration of such post-hearing events discourages employers from using protracted litigation to strengthen

---

[12] Petitioner relies (Pet. 20-21) on the Court's statement that "[t]hese changed circumstances may in turn raise a 'question of representation,' if it is unclear whether a majority of employees continue to support the reorganized union." 475 U.S. at 202. Petitioner is mistaken, since that statement in context refers only to a situation where the Board finds that a new affiliation has "change[d] a certified union's relationship with the employees it represents." *Ibid.* The Court was not suggesting that employee sentiment would be relevant to the threshold determination whether a substantial change in continuity had occurred.

their case. Cf. *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702, 703-706 (1944).[13] In order to allow the bargaining relationship to continue without being subjected to repeated challenges based on any change that may occur, the Board properly bases a continuity determination on facts adduced at the time of the initial hearing. This practice is consonant with the strong policy favoring industrial stability that animated this Court's decision in *FIEA*, 475 U.S. at 202-203. And if substantial post-hearing changes in the union make a significant number of unit employees dissatisfied with their representative, those employees may file a decertification petition, as they may when they are dissatisfied with any action by an incumbent union. See *id.* at 205.[14]

---

[13] Under 29 C.F.R. 102.48(d)(1), newly discovered evidence is grounds for a new hearing only if the evidence existed at the time of the original hearing, the party's failure to adduce it was excusable, and the evidence would have made a material difference in the decision. See, *e.g.*, *NLRB* v. *Cutter Dodge, Inc.*, 825 F.2d 1375, 1381 (9th Cir. 1987).

[14] In any event, the Board specifically found here that petitioner's proffered evidence, if credited, would not have changed the Board's continuity determination. See Pet. App. 23a n.3. On the record presented, that sort of factual issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

MAY 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00891